

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Alteration of the  
Cross Section of Big Sandy Lake  
(1-62) by Robert Graff, Without a  
Permit from the Commissioner of  
Natural Resources

ORDER GRANTING  
SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on cross-motions for summary judgment filed by the parties to this proceeding, the Staff of the Minnesota Department of Natural Resources (hereinafter also referred to as the "Department") and Mr. Robert Graff.

Dennis L. O'Toole, Lano, Nelson, O'Toole & Bengton, Ltd., 115 NE Fifth Street, PO Box 20, Grand Rapids, Minnesota 55744, appeared on behalf of Mr. Robert Graff. David P. Iverson, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department.

The Judge required that the parties submit simultaneous memoranda in support of their motion for summary judgment. Each party was also allowed to submit simultaneous responsive memoranda. The record for consideration of this motion closed on August 14, 1995, the date of receipt of the final memorandum.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the Commissioner of Natural Resources will make the final decision after a review of the record which may adopt, reject or modify the recommendations contained herein. The final decision of the Commissioner of Natural Resources shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Commissioner Rodney Sando, Minnesota Department of Natural Resources, 500 Lafayette Road, St. Paul, Minnesota 55155.

Based upon all the files, records and proceedings herein, including the legal memoranda and attached affidavits submitted by the parties, and for the reasons set out in the memorandum attached hereto, IT IS RECOMMENDED that the Commissioner of Natural Resources issue the following:

ORDER

That the Department's Motion for Summary Judgment is hereby GRANTED and the Department's Findings of Fact and Order dated February 6, 1995 directing Robert Graff to remove fill material placed on the bed of Big Sandy Lake within Aitkin County, Minnesota is hereby AFFIRMED, and Mr. Graff shall pay an additional \$634.36 for field inspection fees.

That Robert Graff's Motion for Summary Judgment is hereby DENIED.

Dated this \_\_\_\_\_ day of September, 1995.

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ALLEN E. GILES  
Administrative Law Judge

#### MEMORANDUM

Robert Graff owns property located in Aitkin County, State of Minnesota on Big Sandy Lake. The property is legally described as: Government Lot 8, Section 30, Township 50N, Range 25W, in the County of Aitkin, State of Minnesota. Big Sandy Lake is a "public water" of the State of Minnesota as defined in Minn. Stat. § 103G.005, subd. 15 (1994). Big Sandy Lake is a reservoir maintained by the Army Corps of Engineers ("Corps") for, among other things, recreational use and flood water storage for the Mississippi River. Big Sandy Lake Reservoir has been in existence since approximately the late 1800s. The Corps maintains the water level of Big Sandy Lake Reservoir through manipulation of a dam system located at the northwestern end of the lake. The ordinary high water level (hereinafter also referred to as "OHW") of reservoirs such as Big Sandy Lake is statutorily defined as "the operating elevation of the normal summer pool." Minn. Stat. § 103G.005, subd. 14(3) (1994). The operating elevation of the normal summer pool for Big Sandy Lake has been established by the Corps to be between 1216.05 to 1216.56 feet above mean sea level (N.G.V.D. 1929). For purposes of this motion, both the Department and Mr. Graff agree that the OHW of Big Sandy Lake is 1216.56 feet, the maximum elevation of the normal summer pool.

Mr. Graff's property is partially located on an island in Big Sandy Lake. Affidavit of Lonnie J. Thomas, Exhibit C. There are currently several recreational cottages located on the island. Id., Exhibit F. The island is situated approximately 150 feet off of a peninsula which stretches into the lake. Id., Exhibit D. On December 3 and 4, 1994, Mr. Graff arranged for the placement of fill material to create a roadway between the peninsula and the island. Id., Exhibit B. The fill is made up primarily of sandy material. The roadway is approximately 150 feet in length by an average of 25 feet in width with a maximum depth of two and one-half feet. Id., Exhibits B, G. The lake bed at the fill location ranges from approximately 1214.50 to 1215.50 feet above mean sea level, depending upon location in relation to the shoreline. Id., Exhibit G. Because the OHW of Big Sandy Lake is 1216.56 feet, the fill material was placed below the OHW of the

lake. Exhibit G. On January 12 1995, Department area Hydrologist Lonnie A. Thomas performed a preliminary elevation survey of the site and concluded that the fill material was placed below the OHW of Big Sandy Lake. By letter dated February 6, 1995, the Department served a Findings of Fact and Order requiring that Mr. Graff restore the lake bed to its previous condition by removing the fill material. Id., Exhibit J. The Department also ordered Mr. Graff to pay field inspection fees in the amount of \$360.08. Additional field inspection fees have been accumulated in the amount of \$634.36 as a result of a wildlife evaluation, an additional inspection by the area hydrologist, and the informal site survey. Id., Exhibit L.

Mr. Graff desires to develop his property on the island for sale as lakeshore property. With roadway access, he estimates that his property has a value of \$320,000. Without roadway access, he estimates that his property has a value of \$20,000. Affidavit of Robert Graff. In a letter dated February 27, 1995, Mr. Graff requested a hearing pursuant to Minn. Stat. § 103G.251, subd. 2(c).

### Summary Judgment

Both parties have moved for summary judgment claiming that there is no genuine issue as to any material fact and as a matter of law they are entitled to judgment in their favor. The Department argues that Mr. Graff placed fill below the OHW of Big Sandy Lake in violation of Minn. Stat. § 103G.245 and Minn. Rule pt. 6115.0190, subp. 3F. Mr. Graff argues that the application of Minn. Stat. § 1036.245 and Minn. Rules pt. 6115.0190, subp. 3F so as to prohibit the construction of a roadway access to the island constitutes an unconstitutional taking of his property in violation of the U.S. Constitution.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955). Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. Rule 56.03. Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rules pt. 1400.5500 K.

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM MidAmerica Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minnesota Rules of Civil Procedure Rule 56.05. Id. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1980). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial

evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

Upon review of this matter, the Judge has concluded that the Department's summary judgment motion should be granted. The Department has established a prima facie violation of Minn. Stat. § 103G.245 and Minn. Rules pt. 6115.0190. Mr. Graff has failed to establish any genuine issue of material fact with respect to the Department's February 6, 1995 Order requiring him to restore the lake to its previous state.

#### The Department's Summary Judgment Motion

The placement of fill materials in public waters for construction of a private roadway is prohibited by Minn. Rules pt. 6115.0190 (1993). Minn. Rules pt. 6115.0190, provides in relevant part as follows:

Subpart 2. Scope. Filling as used in this part involves placement of unconfined or loosely confined materials in protected waters.

Subpart 3. Non-permitted placement. Placement shall not be permitted in the following cases:

- A. To achieve vegetation control;
- B. To create upland areas, except where expressly provided herein;

. . .

F. To construct a roadway or pathway, or create or improve land accesses from peripheral shorelands to islands, or to facilitate land transportation across the waters; . . . .

Any person seeking to change or diminish the course, current or cross-section of public waters by any means, including filling, must have a public waters permit from the Department pursuant to Minn. Stat. § 1036.245 (1994). Section 103G.245 provides in relevant part as follows:

. . . [T]he state, a political subdivision of the state, a public or private corporation, or a person must have a public waters work permit to:

. . .

(2) change or diminish the course, current, or cross-section of public waters, entirely or partially within the state, by any means, including filling, excavating, or placing of materials in or on the beds of public waters.

The roadway constructed by Mr. Graff violates Minn. Rules pt. 6115.0190, subp. 3F and Minn. Stat. § 103G.245. The uncontested facts giving rise to the violation

include the following. Big Sandy Lake is a public water of the State; the roadway constructed by Mr. Graff involved the placement of fill material below the OHW of Big Sandy Lake; the roadway was constructed to gain access from the shoreland to the island where Mr. Graff owns real estate; Mr. Graff did not have a permit for the construction and the roadway is a private road. There is not a genuine issue as to a material fact, summary judgment is appropriate. Based on the foregoing, the Department has established a prima facie violation of Minn. Rules pt. 6115.0190, subp. 3F and Minn. Stat. § 103G.245.

As a defense to the Department's Motion for Summary Judgment, Mr. Graff asserts that he has been the victim of discriminatory enforcement of the Minnesota water law. Mr. Graff states in his affidavit that he is aware of several other areas on Big Sandy Lake where a fill has been placed below the OHW which has been permitted by the DNR. The selective enforcement of the water law against Mr. Graff could result in denial of his rights to equal protection of the laws. The Judge must determine whether this assertion of discriminatory enforcement gives rise to a genuine issue of material fact.

To establish a prima facie case of discriminatory enforcement, a party must show:

- (1) That, while others similarly situated have not generally be proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and
- (2) That the Government's discriminatory selection of him for prosecution had been invidious or in bad faith. . . .

State v. Russell, 343 N.W.2d 36, 37 (Minn. 1984) (quoting United States v. Berrious, 501 F.2d 1207, 1211 (2d Cir. 1974)).

Mr. Graff must prove that the DNR consciously chose to prosecute him while ignoring the other violators and the decision to prosecute him was made in "bad faith". The case law places a very heavy burden on the proponent of discriminatory enforcement. Mr. Graff only asserts that fill was placed in other areas at Big Sandy Lake. He makes no claim as to the scope of the involvement, if any, of the DNR. The general averment asserted by Mr. Graff is not enough to give rise to a genuine issue of material fact. For this reason Mr. Graff has failed to prove that there is a genuine issue of material fact sufficient to resist the Department's motion. It is appropriate to grant the Department's motion.

#### Mr. Graff's Motion for Summary Judgment

Mr. Graff argues that the Department's February 5, 1995 Order requiring him to remove the roadway is constitutionally invalid. Because Mr. Graff's property on the island has substantially diminished value if road access is denied, Mr. Graff argues that the Order requiring removal of the roadway constitutes an unconstitutional taking of his

property rights. Finally Mr. Graff argues that the rule that prohibits construction of the roadway access, Minn. Rules pt. 6115.0190 is invalid.

After review of these arguments, the Judge has concluded that he has no jurisdiction to consider them. The purpose of a contested case proceeding is to determine whether an agency has correctly applied its controlling statute and rules, not to consider whether the agency's rules and statutes violate the constitution. Minn. Stat. § 14.50. The appropriate forum for challenging the facial constitutionality of a statute or rule is the Minnesota Court of Appeals pursuant to Minn. Stat. § 14.69 (1994). Holt v. State Board of Medical Examiners, 431 N.W.2d 905, 906 (Minn. Ct. App. 1988); Neeland v. Clearwater Memorial Hospital, 257 N.W.2d 366, 368 (Minn. Ct. App. 1977).

For the foregoing reasons, the Judge has denied Mr. Graff's Motion for Summary Judgment.

AEG